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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the Matter of	)	
	)	
Requested Amendment of the	)	
Commission's Rules to Permit	)	RM No. 9097
Procedures for Adjudicating	)	
Program Access Complaints	)	
	)	

OPPOSITION OF HOME BOX OFFICE

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OPPOSITION OF HOME BOX OFFICE

Home Box Office ("HBO") hereby responds to the Petition For Rulemaking by Ameritech New Media, Inc. ("Ameritech").

I. Introduction And Summary.

Ameritech's petition seeks to alter fundamentally the Commission's rules governing program access complaints filed under Section 628. For the reasons discussed below, the Commission should deny the petition.

- Ameritech seeks procedural changes in the program access rules ostensibly because complainants are disadvantaged due to the lengthy timeframes for resolution of complaints. That premise is simply wrong. Ameritech's unsuccessful complaint against HBO and Continental Cablevision, Inc. was resolved within four months of the date it was filed at the Commission. Its equally unsuccessful application for review was disposed of in only six months. Further, HBO is aware of only one program access case in which the complainant prevailed; that matter was resolved in six months.

- According to Ameritech, its amendments will shorten the timeframe for resolution of Section 628 complaints. Many of its proposals, however, would have the opposite effect. For example, Ameritech's proposal for discovery as of right would complicate and protract proceedings rather than hasten their conclusion. For that reason, the Commission recently proposed to eliminate or limit sharply complainants' power to take discovery as of right in formal common carrier complaints.

- Much of the relief Ameritech requests already is obtainable under the Commission's rules. For example, forfeitures may be levied upon losing defendants. Likewise, complainants may obtain discovery at the staff's discretion. Thus, Ameritech's request for those two powers is unnecessary. It is well-established that the Commission must deny petitions for rulemaking that seek relief already available under the Commission's rules.

- The Commission previously has rejected arguments that damages are necessary to prevent anticompetitive behavior in the program access context. Ameritech has not presented new information demonstrating that the agency's streamlined complaint process and sanction powers are insufficient to prevent entities from violating the program access rules.

II. Ameritech's Assertion That The Timeframe For Resolving Program Access Complaints Is "Inordinately Lengthy" Is Simply Wrong And, At Any Rate, Ameritech Has Made No Showing That Its Proposals Would Improve The Process.

Ameritech contends that the program access complaint process is flawed because it takes the Commission too long -- approximately one year -- to reach decisions on complaints.[1] Ameritech harshly criticizes the Commission's performance on program access complaints and asserts that this "inordinately lengthy" timeframe is prejudicial to complainants.

Ameritech's arguments are without merit. In complaining about the timeframe for resolving program access cases, Ameritech conspicuously omits the fact that the Commission needed only four months to resolve Ameritech's unsuccessful 1996 program access complaint against HBO and Continental and only six months to

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[1] See Ameritech Petition at 12.

resolve Ameritech's equally unsuccessful application for review.[2] Furthermore, HBO is aware of only one Section 628 complaint case in which the complainant prevailed; resolution of that case occurred in six months.[3] Those program access cases which took longer to resolve were won by the defendants and therefore no prejudice accrued to the complainants during the duration of the proceeding as they were either lawfully being denied access to programming on the basis of valid exclusive contracts or were paying a rate that the Commission ultimately determined was not unlawfully discriminatory. Contrary to Ameritech's assertions, the Commission is deciding program access cases in a timely manner, without causing prejudice to complainants.

Ironically, Ameritech's proposals to shorten the Commission's program access decision process will surely achieve the opposite of its intended effect. For example, its demand for discovery as of right conflicts with its request for short, firm resolution deadlines.[4] Unlimited discovery rights will protract

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2 See Corporate Media Partners, 11 FCC Rcd 7735 (Cable Svs. Bur. 1996), aff'd, 12 FCC Rcd 3455 (1997).

3 See CellularVision of New York, L.P., 10 FCC Rcd 9273 (Cable Svs. Bur. 1995).

4 See Implementation of the Telecommunications Act of 1996 - Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, *Notice of Proposed Rulemaking*, CC Docket No. 96-238, FCC 96-460 at ¶ 49 (rel. Nov. 27, 1996) ("1996 Common Carrier Complaint NPRM") (proposing to abolish or curtail complainants' discovery powers in order to meet the "time pressures of the new statutory deadlines").

the complaint process by injecting additional issues into the proceedings.[5] That is made most evident by the Commission's recent proposal to abolish or limit discovery as of right in light of the new statutory deadlines for resolving common carrier complaints.[6] The Commission already has recognized that a proposal for discovery as of right such as Ameritech's may not co-exist with the kind of tight resolution deadlines Ameritech simultaneously seeks. The introduction of damages would have a similar effect. Not only is Ameritech's proposal for damages unnecessary for the reasons set out in Section IV below, it also would result in additional issues which the agency would have to resolve, *i.e.*, should damages be awarded and if so, how much.

Ameritech's proposals thus would place additional burdens on the complaint process and broaden the scope of issues before the Commission while sharply limiting the deadline for resolution of complaints. Ameritech has not demonstrated any need for the Commission to so strain its resources or limit its ability to manage its docket. Ameritech's Petition therefore should be denied.[7]

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5 See id. at ¶ 49 ("In our experience, discovery has been the most contentious and protracted component of the formal complaint process.").

6 See id. at ¶¶ 49-52.

7 See, e.g., Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, *Report and Order*, 7 FCC Rcd 456, 456, ¶ 2 (1992) (denying petitions for rulemaking that "would not achieve the ultimate benefits sought by the petitioners").

III. The Program Access Rules Provide For Adequate Discovery And Therefore There Is No Justification For The Extraordinary New Discovery Rights Sought By Ameritech.

Ameritech erroneously asserts that a "complainant's' ability to prove a Section 628 violation is dramatically reduced" because "discovery is not routinely available" in program access cases.[8] Ameritech therefore concludes that the program access rules must be overhauled to permit complainants to take "extensive discovery" as of right.[9] The "mere awareness of the possibility of a right to discovery," Ameritech contends, will "deter[]" potential anticompetitive behavior.[10]

The underlying premise of Ameritech's argument -- that discovery is unavailable -- is simply wrong. In the Program Access Order,[11] the Commission stated repeatedly that discovery was available in program access cases "on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint."[12] Discovery powers were given to the staff and not to complainants as of right because the Commission believed most complaints could be resolved routinely on the basis of a

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8 See Ameritech Petition at 17.

9 See id. at 17-20.

10 Id. at 18.

11 See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993) ("Program Access Order").

12 See Program Access Order, 8 FCC Rcd at 3389, ¶ 75; 3416, ¶ 123; 3424, ¶ 147.

complaint, answer, and reply.[13] However, the Commission emphasized throughout the Program Access Order that the staff had the authority "to order any necessary discovery" in the event that a complaint could not be resolved on the pleadings.[14]

Discovery as of right would be more burdensome than beneficial. It certainly flies in the face of both Ameritech's proposal that program access complaints be resolved on a 150 day timeline[15] and Section 628(f)'s admonition that such cases be resolved expeditiously. The Commission is well aware of the fact that discovery complicates and delays its complaint proceedings.[16] For that reason, it chose to expedite program access complaints by vesting the discovery powers in the staff and not in complainants as of right.[17] That decision remains

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13 See id.

14 See id. at 3392, ¶ 81 (emphasis added); see also id. at 3416, ¶ 123; 3420-21, ¶¶ 135-36; 3425, ¶¶ 150-51.

15 Ameritech proposes a 90 day deadline where no discovery is taken.

16 See 1996 Common Carrier NPRM, at ¶ 52 (authorizing staff to limit the scope of discovery because such limitation "could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes").

17 See Program Access Order, 8 FCC Rcd at 3362, ¶ 8; 3424, ¶ 147; 3425, ¶ 151. For similar reasons, the Commission declined to permit discovery as of right in cases involving complaints concerning (1) price discrimination regarding open video systems, see Implementation of Section 302 of the Telecommunications Act of 1996, *Second Report and Order*, 11 FCC Rcd 18223, 18342, ¶¶ 237-238 (1996), and (2) program carriage complaints under Section 616 of the Act. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *Second*

sound; the Commission recently observed that "discovery has been the most contentious and protracted component of the formal complaint process."[18] As noted, the agency has proposed to eliminate entirely or curtail sharply complainants' ability to take discovery as of right in common carrier complaint cases given the new statutory deadlines imposed by Congress.[19]

There are other significant drawbacks associated with discovery as of right. For example, it may allow complainants to embark upon fishing expeditions[20] or to "gain tactical leverage for settlement purposes."[21] In particular, discovery as of right creates the potential for abuse by entities seeking to gain

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Report and Order, 9 FCC Rcd 2642, 2652, ¶ 23 (1993) ("Given the statute's explicit direction to the Commission to handle program carriage complaints expeditiously," we "hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply. . . . . Discovery will not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff."). See also id. at 2655, ¶¶ 31-32 (staff will determine if discovery is appropriate).

18 See 1996 Common Carrier Complaint NPRM at ¶ 49. See also Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, *Report and Order*, CC Docket No. 92-26, 8 FCC Rcd 2614, 2619, ¶ 32 (1993) ("1993 Common Carrier Complaint Order") (noting that delay and expense accompany discovery).

19 See 1996 Common Carrier Complaint NPRM at ¶¶ 49-52.

20 See 1993 Common Carrier Complaint Order, 8 FCC Rcd at 2621, ¶ 38 (noting the need for a relevance standard in discovery as otherwise "discovery would truly become a 'fishing expedition' as parties seek to obtain a wide range of information possibly having little bearing on the allegations of the complaint.").

21 See 1996 Common Carrier Complaint NPRM at ¶ 52.

access to their competitors' pricing information. And, of course, discovery as of right consumes significant agency resources.[22] In addition, discovery as of right would most likely be of only minimal utility. As a practical matter, most complainants receive relevant documents as part of the pleading cycle. For example, in its unsuccessful program access complaint against HBO and Continental, Ameritech received expeditiously all relevant contracts between the two parties as part of their Answers. Consequently, discovery was absolutely unnecessary.[23] In that regard, HBO is not aware of any program access case in which discovery was requested and denied.

In light of the above, Ameritech's petition should be denied insofar as it pertains to discovery. Under Rule 1.401(e) of the Commission's rules, a petition for rulemaking may be denied if it does not warrant consideration by the Commission. Pursuant to this rule, the agency has denied petitions seeking that which is already included in its rules or which did not clearly improve upon existing rules.[24] As shown, discovery is already permitted

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22 See 1993 Common Carrier Complaint Order, 8 FCC Rcd at 2614, ¶ 3.

23 Ameritech's sweeping request that defendants be required to "include [a] copy of the contracts of all other cable operators serving the same area at issue and at least several representative contracts of an affiliated cable operator serving roughly the same number of subscribers" when answering price discrimination complaints is exactly the kind of impermissible fishing expedition frowned on by the Commission. See Ameritech Petition at 15-16.

24 See, e.g., NARUC Petition For Rulemaking, *Memorandum Opinion and Order*, 7 FCC Rcd 3949 (Com. Car. Bur. 1992). In NARUC, the Commission denied a petition for a rulemaking to specify

for program access complaints and therefore whatever "deterrent" effect is conferred by discovery exists under the current rules. In any event, discovery as of right would not "improve" the agency's program access rules.[25] Consequently, Ameritech's petition should not be granted with respect to discovery.

IV. Damages Should Not Be Made Available Under Section 628; The Commission's Existing Rules Adequately Deter Anticompetitive Behavior.

Ameritech asks the Commission to amend its rules to permit forfeitures and or damages for violations of Section 628. Ameritech's petition, however, pointedly omits the fact that the Commission's rules already permit forfeitures in program access cases. In the Program Access Order, the Commission squarely stated that it "may impose sanctions available under Title V of the Communications Act" for violations of the program access

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a minimum frequency within which certain updates must occur because the agency's rules made carriers "accountable to the Commission for their decisions as to the frequency with which they [undertook such] update[s]." See NARUC, 7 FCC Rcd at 3951, ¶ 20. The Commission also rejected a proposal to set certain regulatory floors because "it is unclear whether such a change would improve the rule." See id. at 3951, ¶ 21.

25 Because Ameritech's petition must be denied, there is no need to reach its claim that the program access rules should also be amended to incorporate the sanction provisions of Fed. R. Civ. P. 11 and 37. The Commission has previously rejected a similar argument brought by Ameritech pertaining to common carrier complaints as sanctions would "inevitably inject new and major controversies to the formal complaint process" and because the agency lacks authority to compel payment of attorneys fees. See 1993 Common Carrier Complaint Order, 8 FCC Rcd at 2626, ¶ 69.

rules.[26] One of the sanctions permitted under Title V of the Act is forfeitures.[27] Ameritech's request for forfeitures therefore should be dismissed.[28]

With respect to damages, Ameritech argues that "significant economic penalties are essential to . . . prevent anticompetitive behavior."[29] That argument was presented and rejected by the Commission in the Program Access Reconsideration Order.[30] There the Commission declined to authorize damages because there was no evidence that the Commission's complaint process and sanctions powers under Title V of the Act were insufficient to deter

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26 See 8 FCC Rcd at 3392, ¶ 81 (sanctions may be imposed where a prohibited exclusive arrangement is found); 3420, ¶ 134 (sanctions may be imposed if discrimination is found).

27 The Commission has previously recognized that it could impose forfeitures in program access cases. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, MM Docket No. 92-265, 10 FCC Rcd 1902, 1910, ¶ 16 (1994) ("The Commission also stated [in the Program Access Order] that . . . it could impose sanctions under Title V of the Act, (*e.g.*, forfeitures)."") (emphasis added) ("Program Access Reconsideration Order").

28 See NARUC Petition For Rulemaking, 7 FCC Rcd at 3951, ¶ 20 (dismissing petition for rulemaking because existing rules already permitted the matters sought in the petition).

29 See Ameritech Petition at 23.

30 See Program Access Reconsideration Order, 10 FCC Rcd at 1907-11, ¶¶ 10-18 (rejecting arguments that damages are necessary because forfeitures alone will be an inadequate deterrent to anticompetitive conduct and without damages, vendors have no incentive to discontinue their discriminatory pricing practices).

entities from violating the program access rules.[31] Ameritech has not shown that the Commission's Title V powers are failing to curb anticompetitive programming practices or that the agency's earlier conclusion was otherwise in error.[32] According to Ameritech's own survey, more program access cases have settled than have gone to decision.[33] Moreover, defendants have won more cases than complainants. Thus, the complaint process does curtail anticompetitive abuses. Ameritech's petition should therefore be rejected.[34]

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31 See id. at 1911, ¶ 18 ("[W]e believe that the sanctions available to the Commission, pursuant to Title V, together with the program access complaint process, are sufficient to deter entities from violating the program access rules.").

32 Ameritech also contends that complainants should be entitled to collect the same damages in a program access case as they would be entitled in a private antitrust suit and that cable operators and programmers should not "go unpunished economically simply because they are fortuitous enough to be a defendant in a Section 628 proceeding as opposed to a defendant in an antitrust action instituted in federal court." See Ameritech Petition at 22. However, it is well-settled that successful plaintiffs in antitrust actions are entitled to remedies not permitted in FCC actions. See Craig O. McCaw, 10 FCC Rcd 11786, 11801 n.73 (1995). See also 1993 Common Carrier Complaint Order, 8 FCC Rcd at 2626, ¶ 69 (rejecting request for sanctions because it would be unfair for them to be available in federal court action but not before the Commission).

33 See Ameritech Petition at 13 n.23. To the best of HBO's knowledge, all price discrimination cases have been settled or resulted in victories for the defendants.

34 See National Exchange Carrier Ass'n, 11 FCC Rcd 16504, 16509, ¶ 13 (Com. Car. Bur. 1996) (denying petition for rulemaking as it simply modified another party's previously rejected request without eliminating the predicate for the Commission's earlier rejection).

An additional reason to reject the type of punitive damages Ameritech requests is the fact that the agency lacks authority to award such damages under Section 628. In Just Aaron, the Common Carrier Bureau observed that the agency did not have general authority to award punitive damages in complaint proceedings.[35] Section 628 does not expressly permit the agency to impose damages. Consequently, the Commission must be "particularly chary" of reading new remedies into Section 628.[36] As demonstrated by other parts of the Act, Congress knew how to give the Commission authority to impose damages and did so expressly when it so desired. The fact that Congress did not do so with regard to program access cases indicates its view that the statute and the Commission's implementing rules were sufficient to deter anticompetitive conduct without resort to damages.

Moreover, given Section 628's objectives, there is little need for a damages remedy. Section 628(e) was adopted to remove

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35 See Just Aaron, *Memorandum Opinion and Order*, 10 FCC Rcd 11519, 11520, ¶ 9 (Com. Car. Bur. 1995)("We lack authority, however, under the congressional mandate accorded by our governing statute to award the punitive damages . . . sought by Aaron."). See also Comark Cable Fund III, 100 FCC.2d 1244, 1257 n.51 (1985)(stating that the Commission was unaware of any punitive damages authority).

The Commission also has said that it is without authority to award legal expenses or attorneys fees. See 1996 Common Carrier Complaint NPRM at ¶ 54 (citing Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975)). See also Comark Cable Fund III, 100 FCC.2d at 1257 n.51 ("We have no power to award attorney fees.").

36 See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-21 (1979).

the competitive disadvantages suffered by complainants with respect to the provision of programming or lack thereof. For example, the Commission can and has ordered entities to provide programming where it believes such programming was unlawfully withheld.[37] Further, a damages remedy would require elaborate regulatory mechanisms in order to determine economic damages. For example, such mechanisms would be needed for the Commission to evaluate whether the complainant had lost (or been unable to gain) subscribers and whether and to what extent such loss was caused by the defendant's actions. Instead of creating a damages remedy and its accompanying regulatory processes, the Commission wisely chose to create remedies that satisfy Section 628's goals by alleviating the competitive disadvantages that might be suffered by complainants. There is no need for the Commission to take on the additional regulatory burdens sought by Ameritech.

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[37] See, e.g., CellularVision of New York L.P., 10 FCC Rcd at 9279, ¶ 37 (ordering defendant to sell programming to complainant).

V. Conclusion.

For the reasons discussed above, Ameritech's Petition for Rulemaking must be denied.

Respectfully submitted,

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I Sharon Fields, do hereby certify that copies of the foregoing Opposition of Home Box Office have been sent, via first class mail (or by hand delivery where indicated *), on this 2nd day of July, 1997 to the following:

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